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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROY FRANK MCKOY and LOU ETTA MCKOY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should grant certiorari to determine whether the United States Court of Appeals for the Ninth Circuit erred in reversing the District Court which sanctioned the government for failing to provide Petitioners with Jencks Act material by suppressing the testimony of the witnesses after declaring a mistrial because (1) this is an important question of federal law that has not been, but should be, decided by this Court and (2) the Ninth Circuit has so far departed from the accepted and usual course of judicial proceeding by substituting its opinion for the discretion of the District Court such that an exercise of this Court's supervisory power is called for?

II. Whether this Court should grant certiorari to determine whether the United States Court of Appeals erred in failing to reverse the District Court which failed to dismiss the indictment against the Petitioners on the grounds that a second trial will violate the Double Jeopardy Clause of the United States Constitution when Petitioners were forced to move for a mistrial in the first trial due to the government's overt and repeated violations of the Jencks Act?

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CITATION OF OFFICIAL REPORT

This is an appeal from United States v. McKoy, 78 F.3d 446 (9th Cir. 1996).

STATEMENT OF JURISDICTION

This is an appeal of a decision of the United States Court of Appeals for the Ninth Circuit decided March 4, 1996. The statutory provision that confers jurisdiction on the United States Supreme Court to review a petition for writ of certiorari is 28 U.S.C. § 1254(1)(1988).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

U.S. Const. amend. V, § 2.

> If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct [Jencks Act material], the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the

> court in its discretion shall determine that the interests of justice requires that a mistrial be declared.

18 U.S.C. § 3500(d) (1970).

STATEMENT OF THE CASE

A federal grand jury for the United States District Court for the District of Nevada indicted Petitioners, Roy Frank McKoy and Lou Etta McKoy, for willfully subscribing false income tax returns in violation of 26 U.S.C. § 7206(1)(1988).

Before their trial, the McKoys made a discovery motion in which they asked for all statements made by the government's potential witnesses, identified by name as well as generically. The government agreed that it would produce all Jencks Act, 18 U.S.C. § 3500 (1970), materials thirty days before trial.

A few days into the trial, a witness was testifying for the government and it became apparent that there had been a meeting between this witness and a government agent, but no memorandum of that meeting had been produced. The Assistant United States Attorney explained that he believed the memorandum had been produced on the first day of trial. The District Court admonished the government to make sure that there were no more mistakes of this kind, lest "severe consequences" would ensue.

Shortly thereafter, two critical witnesses testified for the government and were cross-examined. On the sixth day of trial, the government announced that it had discovered Jencks

material concerning those two witnesses in the possession of one of their agents.

In response to these repeated violations of the Jencks Act by the government, the McKoys were forced to move for a mistrial. The District Court determined that it would not be fair to go forward with the trial. In granting the motion for mistrial, the court noted "[t]he defense has appropriately moved for a mistrial, I clearly understand why. In fairness to their clients, they find it necessary to do that, and that's why I grant the motion." See United States v. McKoy, No. CR-S-94-045-PMP (RJJ), slip op. at 4 (D. Nev. Apr. 18, 1995), aff'd in part, rev'd in part, 78 F.3d 446 (9th Cir. 1996).

Before the second trial, the McKoys moved to dismiss the indictment on the grounds of double jeopardy or to suppress the testimony of the two witnesses for whom the government failed to timely provide the Jencks materials. The District Court refused to dismiss, but ordered suppression of the testimony, because "the Government should not be allowed to escape sanction for its failure to timely provide the Jencks materials after being specifically admonished by this Court to do so two days earlier." McKoy, No. CR-S-94-045-PMP (RJJ), slip op. at 14.

Cross-appeals ensued. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's finding that no double jeopardy rights were violated. United States v. McKoy, 78 F.3d 446, 450 (9th Cir. 1996). However, the Ninth Circuit substituted its opinion for the discretion of the trial court and found that suppressing the witnesses' statements after declaring a mistrial was too severe a sanction for the circumstances. McKoy, 78 F.3d at 452.

ARGUMENT

Compelling reasons exist as to why certiorari should be granted in this case. First, an important question of federal law concerning the appropriate sanction to impose upon the government for violating the Jencks Act has not been, but should be, settled by this Court. See Sup. Ct. R. 10(c). Second, the United States Court of Appeals for the Ninth Circuit has departed from the accepted and usual course of judicial proceedings for which this Court's supervisory power is called for when the Ninth Circuit substituted its opinion for the discretion of the District Court in sanctioning the government. See Sup. Ct. R. 10(a). Third, unless this Court reviews this matter, the Double Jeopardy Clause of the United States Constitution will be violated when Petitioners are forced to undergo a second trial.

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT WHICH SANCTIONED THE GOVERNMENT FOR FAILING TO PROVIDE PETITIONERS WITH JENCKS ACT MATERIAL BY SUPPRESSING THE TESTIMONY OF THE WITNESSES AFTER DECLARING A MISTRIAL BECAUSE (1) THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT AND (2) THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL

COURSE OF JUDICIAL PROCEEDINGS BY SUBSTITUTING ITS OPINION FOR THE DISCRETION OF THE DISTRICT COURT SUCH THAT AN EXERCISE OF THIS COURT'S SUPERVISORY POWER IS CALLED FOR.

A. Government sanctions for violating the Jencks Act are an important federal question requiring this Court's review and determination.

There is a compelling reason to grant certiorari in this case so that this Court may make a definitive statement as to a trial court's discretion to impose sanctions upon the government when the government violates the Jencks Act, 18 U.S.C. § 3500 (1970). Simply put, the government should suffer some serious sanction for egregious conduct in violating the Jencks Act.

The District Court was correct in sanctioning the government for failing to produce Jencks material by suppressing witness testimony in a second trial after granting a mistrial. While the District Court initially found the government's conduct was not intentional, upon reflection, the District Court did find the conduct was negligent and in derogation of Petitioners' rights which required sanctioning the government.

> Therefore, the Court finds that the interests of justice in this case requires that the testimony of Joan Lengacher and Santillo Troy should be suppressed during the second trial as a sanction for the Government's failure to timely provide Jencks materials during the first trial. While the

> Government will undoubtedly view the sanction as harsh, it must be remembered that in a criminal trial, where an individual's liberty is at stake, the Government is under a strict obligation to proceed with the prosecution in [a] manner that conforms to the dictates of the law. Where, as here, the Government repeatedly fails in this obligation and the result is a mistrial, it becomes necessary to reinforce the importance of this responsibility with the imposition of sanctions.

United States v. McKoy, No. CR-S-94-045-PMP (RJJ), slip op. at 15 (D. Nev. Apr. 18, 1995), aff'd in part, rev'd in part, 78 F.3d 446 (9th Cir. 1996).

The Ninth Circuit found that both a mistrial and suppression of testimony too severe a sanction for a Jencks violation in this case. United States v. McKoy, 78 F.3d 446, 451-52 (9th Cir. 1996). The problem with the Ninth Circuit position is that, except for "special instances" such as when the Jencks material is destroyed and can never be produced, see United States v. Well, 572 F.2d 1383 (9th Cir. 1978), the trial court would be deprived of the discretion to impose both sanctions--mistrial and suppression of witness testimony--upon the government. McKoy, 78 F.3d at 451. Yet, when the mistrial is necessary to avoid prejudice to the defendant, the government would not be sanctioned. This would be true no matter how egregious the government's actions are or how the mistrial effects the government's case. If witnesses are allowed to testify after the government rectifies overt Jencks Act violations, there will have been no effective sanction for the Jencks Act violations.

If the remedy for Jencks Act failures is limited to a mistrial and the government is permitted to use that witness at a second trial, there is, in fact, no sanction at all. In such a scenario, those who are actually "sanctioned' are (1) the trial court for loss of time and effort; (2) the taxpayers, who ultimately foot the bill; and (3) the defendants, who are required to run the gauntlet a second time through no fault or doing of their own and often at considerable expense.

The Jencks Act is an important source of information for the criminal defendant. If the government fails to abide by the terms of the Jencks Act, then the government should suffer the consequences, not the defendant.

The Jencks Act generally has implications in every federal criminal trial. The issue of government sanctions has not been, but should be, settled by this Court. Therefore, this Court should issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

B. The United States Court of Appeals for the Ninth Circuit departed from the accepted and usual course of judicial proceedings in this matter by substituting its opinion for the discretion of the District Court such that review by this Court is warranted.

The United States District Court for the District of Nevada determined that the appropriate sanction to impose upon the government for violating the Jencks Act in this matter was both to declare a mistrial and suppress the witnesses' testimony. However, the Ninth Circuit reversed the trial court's determination and found, based on the course of

proceedings, that the only appropriate sanction was to declare a mistrial.

This determination was beyond the scope of the Ninth Circuit's review. As noted by the Ninth Circuit, their review of the sanctions for the Jencks Act violation was for an abuse of discretion on the part of the District Court. McKoy, 78 F.3d at 449 (citing United States v. Echeverry, 759 F.2d 1451, 1456 (9th Cir. 1985)). The Ninth Circuit, however, did not find an abuse of discretion by the District Court; rather the Ninth Circuit reviewed the matter de novo and substituted its opinion for the District Court's discretion. McKoy, 78 F.3d at 451-52.

It has long been recognized by the Ninth Circuit that "'[t]he administration of the Jencks Act is entrusted to the 'good sense and experience' of the district judge 'subject to the appropriately limited review of appellate courts.'" United States v. Dupuy, 760 F.2d 1492, 1497 (9th Cir. 1985)(quoting United States v. Parker, 549 F.2d 1217, 1224 (9th Cir. 1977), cert. denied, 430 U.S. 971 (1977)).

The appropriate sanction to impose upon the government's egregious conduct in violating the Jencks Act should be left to the trial court for a determination and, if that, determination includes both a mistrial and suppression of witness testimony, so be it.

Because the Ninth Circuit exceeded its limited review of the Jencks Act administration, this Court should issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT WHICH FAILED TO DISMISS THE INDICTMENT ON DOUBLE JEOPARDY GROUNDS.

A. Unless this Court issues a Writ of Certiorari to review Petitioners' claim of double jeopardy, Petitioners' Constitutional rights will be violated by the second trial in this action.

Petitioners moved to dismiss the indictments in this matter claiming a second trial will violate Petitioners' right against double jeopardy. As succinctly stated by this Court:

> [T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.

Abney v. United States, 431 U.S. 651, 660-61 (1977).

In order to avoid being twice put on trial for the same offense, this Court should issue a Writ of Certiorari to review

the decision of the United States Court of Appeals for the Ninth Circuit.

B. A second trial of the Petitioners is precluded by the Double Jeopardy Clause of the United States Constitution.

The purposes and policies of the Double Jeopardy Clause were set forth by Mr. Justice Harlan as follows:

> The Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. . . . [T]he policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and

compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." These considerations have lead this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. . . .

But it is also true that a criminal trial is, even in the best circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, *e.g.*, the health of various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times. And when one adds the scheduling problems arising from case overloads, and the Sixth Amendment's requirement that the single trial to which the double jeopardy provision restricts the Government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide. . . . "[A] defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to

> the public's interest in fair trials designed to end in just judgments."

United States v. Jorn, 400 U.S. 470, 479-480 (1971)(plurality opinion)(footnote and citations omitted).

As suggested by Justice Harlan's opinion in Jorn, the criminal defendant's right to have his guilt or innocence determined in a single proceeding is not absolute. The Court must balance the defendant's rights under the Constitution against society's interest in having guilt or innocence justly and fairly determined. In reaching that balance, two fundamental principles of double jeopardy jurisprudence come into play. First,

> Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.

Downum v. United States, 372 U.S. 734, 736 (1963). Second,

> We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be unlimited, uncertain and arbitrary judicial discretion.'

Downum, 372 U.S. at 738 (footnote omitted).

In the present case, the District Court had a number of remedial options before it, in light of the clear Jencks Act violations. The District Court initially determined that striking the testimony would be unfair to the government. McKoy, No. CR-S-94-045-PMP (RJJ), slip op. at 13-14; McKoy, 78 F.3d at 452. The District Court believed that without the witnesses's testimony, the government would have been severely disadvantaged. McKoy, 78 F.3d at 452. By choosing to grant

a mistrial, the District Court in effect "afford[ed the prosecution] another more favorable opportunity to convict the accused." United States v Gori, 367 U.S. 364, 369 (1961). While we recognize the District Court was trying to effectuate a balance, by granting the government a "more favorable opportunity to convict," the Double Jeopardy Clause was implicated.

The District Court determined that Petitioners "consented" to the mistrial because they moved for the mistrial in conjunction with the other motions and did not insist that the case go forward, in the face of the Court's judgment that it would not strike the testimony under the circumstances of this case. However, Petitioners did not "control" the choice of remedy. It was the District Court, at the urging, or at least the suggestion, of the government, which determined that striking the testimony would be unfair to the government. Since it was the government which created the problem, and the District Court who decided that striking the testimony would be unfair to the government, it is difficult to conclude that Petitioners are "responsible" for the second prosecution. See United States v. Dahlstrum, 655 F.2d 971, 976 (9th Cir. 1981), cert. denied, 455 U.S. 928 (1982).

The Ninth Circuit has discussed the consent issue in terms of the "control" the defendant had over the termination of the proceedings. If the defendant is deemed to have had control over the termination then, in essence, the defendant can be said to have consented. Unless Petitioners "consent" or "control" is found to have risen to a meaningful level, double jeopardy will attach after the initial proceedings. Dahlstrum, 655 F.2d at 975. Where the defendant's involvement in the termination of the trial "was at best minimal," Dahlstrum, 655

F.2d at 975, and it was the prosecution and the Court who were primarily responsible for the termination of the proceedings, the Court should find that jeopardy has attached and the motion to dismiss the indictment should have been granted. Dahlstrum, 655 F.2d at 975-76.

In the present case, the termination of the proceedings was solely due to the government's repeated failure to comply with the Jencks Act. The District Court's choice of granting the mistrial, rather than striking the tainted testimony or granting Petitioners' request for a dismissal, when coupled with the District Court's reasoning that it would be unfair to the government to proceed without the benefit of the testimony, establishes Petitioners were not "responsible" for the termination of the trial. Petitioners clearly "did not 'voluntarily choose' to avoid submitting the case to the trier of facts on the merits," Dahlstrum, 655 F.2d at 976, when the whole matter arose from what can only be described as repeated and blatant violations of the Jencks Act by the government.

The Ninth Circuit's recent decision in Weston v. Kernan, 50 F.3d 633 (9th Cir. 1995), recognizes that the issue of consent boils down to whether "'the defendant retain[ed] primary control over the course to be followed' after judicial or prosecutorial error." Weston, 50 F.3d at 637 (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)).

In the present case, Petitioners initially asked the Court to dismiss the case or in the alternative, to strike the witnesses's testimony, and only later expanded their request for relief to include a mistrial. McKoy, No. CR-S-94-045-PMP (RJJ), slip op. at 3-4. Petitioners were primarily seeking to terminate the prosecution with prejudice or to go forward with the testimony. While a mistrial was added to the relief sought by Petitioners,

the Ninth Circuit has recognized that "[a] defendant's consent to mistrial may be inferred 'only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order.'" Weston, 50 F.3d at 637 (quoting Glover v. McMackin, 950 F.2d 1236, 1240 (6th Cir. 1991)). Where multiple relief is sought and the District Court chooses the relief--the choice and practical control exercised by the Court renders the matter sufficiently analogous to a mistrial granted sua sponte so as to implicate the Double Jeopardy Clause.

In Weston, this Court seemingly endorsed the procedure set forth in United States v. Huang, 960 F.2d 1128, 1133 (2d Cir. 1992), where the District Court, after stating it would not grant the mistrial with prejudice, gave the defendants the opportunity to withdraw their motion for mistrial. Weston, 50 F.3d at 638. Such an opportunity--not provided here--would have clearly layed control of the termination of the proceedings in Petitioners--where it Constitutionally rested.

We recognize the often repeated black letter law that "ordinarily" a motion by a defendant for mistrial precludes a double jeopardy claim. However, when a mistrial is granted for the benefit of the government, following prejudicial error by the government, and the intent and effect is to afford the government "another, more favorable opportunity to convict," Gori, 367 U.S. at 369, double jeopardy protections are violated. While Petitioners can point to no case which has upheld a double jeopardy claim under these circumstances, it has found no similar case where the claim has been rejected. As in most cases involving the Double Jeopardy Clause, the answer is not an easy one because of conflicting policy considerations. However, since the government designated this a "closed file" case, and then failed to comply with the Jencks Act, it should

not now be allowed a more favorable opportunity to convict Petitioners because it failed to follow the rules it chose to play by. Any doubt here should be resolved "in favor of the liberty of the citizen." Downum, 372 U.S. at 738.

If this Court determines that Petitioners did not consent to the mistrial, retrial would only be permitted if the government can demonstrate the mistrial was caused by "manifest necessity." Weston, 50 F.3d at 636. As noted by the Ninth Circuit in Weston "[t]he [government] bears the heavy burden of demonstrating the 'high degree' of necessity required for a declaration of mistrial without the defendant's consent". Weston, 50 F.3d at 638.

Where it is uncertain that a reversal would have resulted because of error in the trial, the Ninth Circuit has stated that four factors should be considered in determining whether the Court properly exercised its discretion. These factors are (1) whether the Court heard the position of the parties with regard to a mistrial; (2) whether it considered alternatives to granting a mistrial; (3) whether it acted deliberately and not abruptly; and (4) whether it determined the defendant would benefit from a mistrial. United States v. Bates, 917 F.2d 388, 395-96 (9th Cir. 1990); Weston, 50 F.3d at 639.

The District Court considered the position of the parties and did act deliberately and not abruptly. The mistrial was granted because of an initial determination by the District Court that striking the testimony of the two witnesses could prejudice the jury against the government and would be too much of a sanction against the government for its violation of the Jencks Act. However, taking the government's interest into consideration offended the Double Jeopardy Clause since the retrial here is being undertaken for the benefit of the

government. Given the fact that the Jencks violation was solely the fault of the government, after prior admonitions by the District Court, it offends double jeopardy principles to require Petitioners to stand for retrial.

In order to avoid being twice put on trial for the same offense, this Court should issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Petitioners, Roy Frank McKoy and Lou Etta McKoy, respectfully request that this Court grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

McKoy, 78 F.3d 446 (9th Cir. 1996)]

Nos. 95-10181, 95-10186

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROY McKOY and LOU ETTA McKOY,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROY FRANK McKOY and LOU ETTA McKOY,

Defendants-Appellants.

Argued and submitted February 12, 1996
Decided March 4, 1996

[447] Bruce I. Hochman and Steven Toscher, Hochman, Salkin & Deroy, Beverly Hills, California and C. Stanley Hunterton, Hunterton & Naylor, Las Vegas, Nevada, for defendants-appellees-cross-appellants.

Michael E. Barr, Assistant United States Attorney, Las Vegas, Nevada, and Elizabeth D. Collery, United States Department of Justice, Washington DC, for plaintiff-appellant-cross-appellee.

Appeal from the United States District Court for the District of Nevada; Philip M. Pro, District Judge, Presiding.

[448] Before: HUG and FERNANDEZ, Circuit Judges, and KELLEHER,* District Judge.

FERNANDEZ, Circuit Judge:

Roy Frank McKoy and Lou Etta McKoy were indicted for willfully subscribing false income tax returns. 26 U.S.C. § 7206(1). Trial commenced, but a mistrial was declared because of Jencks Act[1] violations by the government. 18 U.S.C. § 3500. A new trial was set. The McKoys then asserted that retrial as barred by their right to be free from double jeopardy. The district court denied their motion, but suppressed the use of testimony from two government witnesses. Both the

[1]The Act takes its name from *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 110 (1957).

McKoys and the government appealed. We affirm in part, reverse in part, and remand.

BACKGROUND

A federal grand jury for the district of Nevada indicted the McKoys on three counts of willfully subscribing false federal income tax returns for the years 1987, 1988, and 1989. 26 U.S.C. § 7206(1). The indictment charged that the McKoys underrepresented their adjusted gross income by several hundred thousand dollars for each of the years in question.

Before their first trial, the McKoys made a discovery motion in which they asked for all statements made by Santillo Troy, Joan Lengacher, Andrew Tomaro, and Danny Tomaro. The government agreed that it would produce all Jencks Act[2] materials thirty days before trial. It did produce much of the promised material even earlier than that. However, other material was not produced until the very day of trial, January 26, 1995.

A few days later, Daniel Tomaro testified for the government. During cross examination it became apparent that there had been a meeting between Tomaro and a government agent, but that no memorandum of that meeting had been produced before cross examination commenced. The Assistant United States Attorney explained that he thought that the statement had been produced on the first day of trial, although, apparently, it had not been. The government then produced it, and the district court admonished the government to make sure that there were no more mistakes of that kind, lest "severe

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[2]*See* 18 U.S.C. § 3500; Fed. R. Crim P. 26.2.

consequences" ensue.

Alas, more mistakes occurred. On January 31, 1995, Joan Lengacher testified and was excused. On February 1, 1995, Santillo Troy testified and was excused. On February 2, 1995, the sixth day of trial, the government announced that it had discovered additional Jencks material regarding the testimony of Lengacher and Troy. The AUSA explained that the material had been kept by Agent Burns, that Burns did not realize he had to supply it, and that it had not come to counsel's attention until the previous evening.

In response to these undoubted violations of the Jencks Act, the McKoys moved to strike the testimony of Lengacher and Troy or for a mistrial. The district court gave defense counsel an opportunity to review the newly submitted materials and heard argument from both parties. It then determined that it would not be fair to go forward with the trial but that the government had not acted in bad faith. So, it said, "[t]he defense has appropriately moved for a mistrial. I clearly understand why. In fairness to their clients, they find it necessary to do that, and that's why I grant the motion."

A retrial was scheduled, but the McKoys moved to dismiss the indictment on grounds of double jeopardy or to suppress the testimony of Lengacher and Troy. The district court refused to dismiss, but did order suppression of the testimony because, as it said, "the Government should not be allowed to escape sanctions for is failure to timely provide the Jencks materials after being specifically admonished by this Court to do so two days earlier." Neither side was satisfied, so these appeals ensued.

[449] JURISDICTION AND STANDARDS

OF REVIEW

We have jurisdiction to entertain an appeal from the denial of a motion to dismiss an indictment on double jeopardy grounds. *See Abney v. United States*, 431 U.S. 651, 663, 97 S.Ct. 2034, 2042, 52 L.Ed.2d 651 (1977); *United States v. Szado*, 912 F.2d 390, 393 (9th Cir. 1990). We also have jurisdiction to entertain an appeal by the government from an order of the district court suppressing or excluding evidence provided that the government "certifies to the district court that the appeal is not taken for delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731; *United States v. Becker*, 929 F.2d 442, 444-45 (9th Cir.), *cert. denied*, 502 U.S. 862, 112 S.Ct. 183, 116 L.Ed.2d 145 (1991); *United States v. Eccles*, 850 F.2d 1357, 1359-60 (9th Cir. 1988). The notices of appeal were timely, and the government has made the necessary certification. Thus, we do have jurisdiction to hear both interlocutory appeals.

We review *de novo* a district court's denial of a motion to dismiss on double jeopardy grounds. *United States v. Sammaripa*, 55 F.3d 433, 434 (9th Cir. 1995). We review a district court's decision regarding the imposition of sanctions for a Jencks Act violation for an abuse of discretion. *See United States v. Echevery*, 759 F.2d 1451, 1456 (9th Cir. 1985); *cf. United States v. Parker*, 549 F.2d 1217, 1224 (9th Cir.), *cert. denied*, 430 U.S. 971, 97 S.Ct. 1659, 52 L.Ed.2d 365 (1977).

DISCUSSION

The McKoys assert that their double jeopardy rights will be violated by a new trial because they did not consent to a mistrial and that at the very least the testimony of the government witnesses must be suppressed. They are incorrect in both respects. The government asserts that the district court had no ability to suppress witness statements after it had granted the mistrial and that it certainly could not do so in this case. We disagree with the government's first contention, but the second one has merit.

A. *Double Jeopardy.*

It is a commonplace that "[t]he Double Jeopardy Clause of the Fifth Amendment protects a person from being 'twice put in jeopardy of life or limb' for the same offense." *Weston v. Kernan*, 50 F.3d 633, 636 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 351, 133 L.Ed.2d 247 (1995). Moreover, there can be no doubt that jeopardy attached when the first jury was impaneled and sworn. *See Sammaripa*, 55 F.3d at 434. Of course, that leaves the question of what the effect of a mistrial may be, but it is a question with a relatively clear answer.

When a court declares a mistrial, "retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by 'manifest necessity.'" *Weston*, 50 F.3d at 636 (citing *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1978)). "Where a mistrial has been declared at the request of the defendant, the Double Jeopardy Clause is no bar to retrial unless the defendant can show that the 'conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving

for a mistrial.'" *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991)(quoting *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416 (1982)).

In this case it is apparent, and the district court found, that the government did not intentionally goad the McKoys into seeking a mistrial. They do not contend the contrary. They hardly could. As the district court pointed out, the government attempted to talk it out of doing anything but granting a continuance to the McKoys at the first trial, the case was not going badly for the government, and it could not be said that the government would gain an advantage if a mistrial were granted. *See Lun*, 944 F.2d at 644-46. That leaves the McKoys with the argument that they did not consent to a mistrial, an argument that has no real force in light of the fact that they asked the court to grant one. *See Kennedy*, 456 U.S. at 679, 102 S.Ct. at 2091.

[450] The McKoys attempt to avoid this almost apodictic result by asserting that they had no control over the choice of remedy. They rely upon our holding that when a defendant has "practically no control" over the mistrial decision and "is not responsible for the termination of his trial," the double jeopardy bar applies. *United States v. Dahlstrum*, 655 F.2d 971, 976 (9th Cir. 1981), *cert. denied*, 455 U.S. 928, 102 S.Ct. 1293, 71 L.Ed.2d 472 (1982). In doing so they read *Dahlstrum* in a manner that would put it in conflict with *Kennedy*. But in *Dahlstrum* we did not declare that where a defendant moves for alternate forms of relief he is then out of control if the district court selects one of them. In that case, the district court had *sua sponte* declared a mistrial and did not even ask for the defendant's opinion on the question. *Id.* at 975. That, of course, is far different from the situation that we are faced with.

Nor does the mere fact that the McKoys may have felt compelled to ask for the mistrial alternative mean that they can now claim double jeopardy. As we have said, "[e]ven if we assume defendants had no realistic choice but to seek mistrial, this does not bar a retrial. *Kennedy* does not stand for that proposition." *Lun*, 944 F.2d at 646. In short, the district court did not err when it denied the double jeopardy motion.

B. *Suppression of Statements.*

There can be little doubt that the government ran afoul of discovery strictures when it failed to make a timely disclosure of witness statements. The Jencks Act was violated. 18 U.S.C. § 3500(b). So was Federal Rule of Criminal Procedure 26.2(a), which contains the substance of the Jencks Act.[3] *See United States v. Conners*, 825 F.2d 1384, 1389 (9th Cir. 1987). Both the Jencks Act and Federal Rule of Criminal Procedure 26.2 provide for the production of statements made by government witnesses after those witnesses have testified on direct examination. 18 U.S.C. § 3500(b); Fed. R. Crim. P. 26.2(a); *see generally Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). Each also provides for sanctions in the event that the government does not comply with its provisions. The Jencks Act provides that:

> If the United States elects not to comply with an order of the court . . . , the court shall strike from the record the testimony of the witness,

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[3]The Jencks Act has not been repealed, but its use may be limited by Rule 26.2. *See* 2 Charles A. Wright, Federal Practice and Procedure § 437, at 586 (1982).

> and the trial shall proceed unless the court in its discretion shall determine that the interest of justice require that a mistrial be declared.

18 U.S.C. § 3500(d). The Federal Rules of Criminal Procedure phrase the sanction provision somewhat differently, but retain the disjunctive form: "[T]he court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or . . . shall declare a mistrial if required by the interest of justice." Fed. R. Crim. P. 26.2(e).

The government seizes upon the disjunctive form of this language to argue that a district court may *never* impose both the sanction of a mistrial and the sanction of suppressing the testimony of the witness when a Jencks Act violation occurs. It asserts that the grammatical structure leads inexorably to that conclusion. We agree that application of the usual rules of grammar is an important guide to determining the plain meaning of a statute or rule, but the demands of grammar are not always obvious. *See, e.g., United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).

The provisions in question are not quite as simple as a statement to a child that he may have an apple or an orange, a statement that almost necessarily implies he cannot have both. These discovery provisions have a more complex basis. They are intended to confer upon district courts the ability to remedy the harms caused when the government does not fulfill its discovery obligations. We can readily imagine that the framers of the provision expected that it would be an unusual case when both sanctions were needed, but it is considerably more difficult to imagine that they intended to prohibit district courts from using both regardless of the circumstances. A motion for

production of Jencks Act materials is an important discovery tool, [451] and flexibility is needed, just as it is needed in other types of discovery. *Cf.* Fed. R. Crim. P. 16. In general "the administration of the Jencks Act must be entrusted to the 'good sense and experience' of the trial judges subject to 'appropriately limited review of the appellate courts.'" *United States v. Augenblick*, 393 U.S. 348, 355, 89 S.Ct. 528, 533, 21 L.Ed.2d 537 (1969)(citation omitted); *see also Slye v. United States*, 602 A.2d 135, 138 (D.C. App. 1992).

We, of course, recognize that, as a matter of logic, the court cannot impose both sanctions in a single proceeding. If the court orders a mistrial, there is essentially no testimony left to strike. Likewise, if the court strikes the testimony of a witness, it implies that the trial will continue. However, the language of the provisions does not expressly state that the district court cannot impose the sanction of mistrial at the first trial proceeding and them impose the sanction of suppression on the retrial proceeding. An example of an instance where that was appropriate is found in *United States v. Well*, 572 F.2d 1383 (9th Cir. 1978)(per curiam).

In *Well*, we affirmed the imposition of sanctions against the government for a Jencks Act violation. The district court had *sua sponte* granted a mistrial after it was discovered that the government had failed to turn over tape recordings of its witnesses and that the tapes had been erased. *Id.* at 1384. Before the retrial, the district court also granted Well's motion to suppress the testimony of the witnesses whose interviews had been tape recorded. We affirmed the district court's imposition of both sanctions--the mistrial and the suppression of the witnesses' prior testimony. *Id.* at 1385. Those are the sanctions imposed by the district court in this case. However,

in *Well* the information could never be made available; it was lost forever. Thus, if the witnesses could testify at the new trial, that would lead to another mistrial and then another and another ad infinitum. To avoid that absurdity, it was necessary to preclude the witnesses from testifying at all. The continuing violation simply demanded both penalties.

In sum, while we agree that it is difficult to envision many instances where the imposition of dual sanctions would be necessary or appropriate, that is not to say that there are none. *Well* explicates one instance, and by testing the rule the government argues for, it demonstrates that the rule itself would be deficient. The question, then, is whether this case is one of those special instances, that is, whether the district court properly exercised its sanctioning discretion. We hold that it did not.

In imposing sanctions against the government for violations of the Jencks Act, the district court should consider the "culpability of the government . . . and the injury to the defendants." *United States v. Finnegan*, 568 F.2d 637, 642 (9th Cir. 1977); *see also Echeverry*, 759 F.2d at 1456 (affirming denial of motion for sanctions where the government conduct was inadvertent); *United States v. Sterling*, 742 F.2d 521, 524-25 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099, 105 S.Ct. 2322, 85 L.Ed.2d 840 (1985)(same); *United States v. Polizzi*, 500 F.2d 856, 893-94 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975)(same).

The government was not without fault. Its coordination of discovery was far from crisp. Earlier in the trial, it had failed to provide Jencks material in a timely fashion, and the district court had admonished it to be more careful or face

"serious consequences."[4] Just two days later, the government admitted that it had again failed; additional material regarding its witnesses Lengacher and Troy was discovered after both of them had testified and been excused. The government explained that the problem had resulted from a series of misunderstandings and miscues between government agents. To his credit, as soon as the AUSA [452] became aware of the material he brought it to everyone's attention.

The district court recognized that there was a possibility of prejudice to the McKoys if the first trial continued, but also recognized that the government had unintentionally erred. The court balanced all of that--prejudice versus culpability--in reaching its conclusion that a mistrial was the proper remedy. As it said, "To strike the testimony of these witnesses, however, absent any basis to find that there was bad faith or misconduct on the part of the Prosecution, . . . would be unfair to the Government and a windfall to the defense." However, prior to the retrial the court went on to suppress the testimony of Lengacher and Troy because, as it said, "it would be unjust for the hardship that is the result of the Government's negligent actions to fall solely on Defendants' shoulders."

The district court was correct the first time. The record shows that each time the district court sanctioned the

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[4]The McKoys point to still another instance where the government provided Jencks material somewhat late. It provided the material on the first day of trial, even though it had previously represented that all of the material had been provided on November 1, 1994. Technically, however, that did not constitute a violation of the Jencks Act. *See* 18 U.S.C.§ 3500(a)(material not required to be disclosed until after the witness has testified). For the same reason it was not a violation of Federal Rule of Criminal Procedure 26.2.

government, it weighed the culpability of the government and the injury to the McKoys. *See Finnegan*, 568 F.2d at 642. In neither instance did if find intentional wrongdoing on the government's part, and even in its second ruling it failed to find prejudice to the McKoys. What it did say was that the hardship should not rest solely upon the McKoys. But the hardship did not rest upon them alone, and the district court recognized as much in its ruling on the double jeopardy motion, where it pointed out the harms that the government would suffer.

The purpose of production of statements is to give defendants impeachment materials at a time when they can effectively use them. *See Jencks*, 353 U.S. at 666-69, 77 S.Ct. at 1012-13. That objective was fulfilled when the court granted a mistrial because the impeachment material was placed in the McKoys' hands long before the witnesses were to testify. Indeed, as far as the retrial is concerned, the McKoys had the material far earlier than the Jencks Act would require.

It is true that the McKoys will suffer the nuisance of a new trial. But in exchange for that they have also obtained the mistrial they asked for, they have had an opportunity to see the government put on most of its case, the government cannot gain from surprise, the government will suffer from the possibility that the witnesses's memories will fade further, and the government will also have to expend the added resources needed to participate in another trial. No further sanctions were needed to ensure justice; no further sanctions were appropriate.

CONCLUSION

The Government failed to live up to its discovery responsibilities under the Jencks Act and Rule 26.2. We expect

the government to do better than that. On the other hand, we recognize that the government is not a being with ichor in its veins, nor is it a being from a more advanced planet. It is a conglomeration of human beings. Thus, by definition it is imperfect, for humans are neither beasts nor angels. In this case, the district court determined that the imperfection was not due to intentional wrongdoing or bad faith. It also determined that it should grant the McKoys request for a mistrial because that measured response would be fair to the McKoys and to the government. We agree. As a result, the McKoys cannot demonstrate a breach of their double jeopardy protections.

However, the district court should not have gone on to hobble the government by preventing it from calling important witnesses to the McKoys' activities. We fully understand the district court's concern for fairness to the McKoys and can even understand its vexation with the government. However, both parties are entitled to a trail in which important witnesses can be called testify, subject to informed cross examination. That result was fully accomplished when the mistrial was granted. The additional sanction was not necessary or appropriate. The imposition of it was error.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

*The Honorable Robert J. Kelleher, Senior United States District Judge, United States District Court for the Central District of California, sitting by designation.

[United States v. McKoy, No. CR-S-94-045-PMP (RJJ) slip op. (D. Nev. Apr. 18, 1995), aff'd in part, rev'd in part, 78 F.3d 446 (9th Cir. 1996)]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CR-S-94-045-PMP (RJJ)
April 18, 1995

ROY FRANK McKOY and
LOU ETTA McKOY,

Defendants.

_____/

ORDER

On February 15, 1994, a federal grand jury indicted Roy Frank McKoy and Lou Etta McKoy on three counts of making a false income tax return in violation of 26 U.S.C. § 7206(1). On January 26, 1995, the jury trial commenced on those charges. On the morning of February 2, 1995, the sixth day of the trial, the Government's prosecutor appeared before the Court and disclosed that the Government had failed to timely provide Jencks material to the defense regarding two Government witnesses, Santillo Troy and Joan Lengacher.

Upon a review of that violation and a determination that Defendants had been prejudiced, the Court granted Defendants' motion for mistrial.

[2] Presently before the Court are two Motions to Dismiss filed by Defendants. On March 17, 1995, Defendants filed their Motion to Dismiss on Double Jeopardy Grounds or in the Alternative to Suppress the Testimony of Joan Lengacher and Santillo Troy (# 106). On March 21, 1995, the Government filed its Opposition (# 107) to this Motion, to which Defendants Replied(# 110) on March 31, 1995.

Also before the Court is Defendants' Motion to Dismiss and/or Suppress (# 101), filed on March 16, 1995, which seeks to dismiss the Government's case or suppress all evidence acquired by the Internal Revenue Service in the course of its alleged civil investigation. The Government filed its Opposition (# 108) to this Motion on March 21, 1995. On March 31, 1995 Defendants filed their Reply (# 111).

I. Defendants' Motion to Dismiss on Double Jeopardy Grounds or in the Alternative to Suppress the Testimony of Joan Lengacher and Santillo Troy (# 106)

Defendants seek dismissal of this action on the grounds that a retrial of this matter would violate the Double Jeopardy Clause of the United States Constitution. Defendants argue that the Court improperly considered the fairness to the Government in the face of the Government's violation of the Jencks Act and in violation of the underlying policy and spirit of the Double Jeopardy Clause. In anticipation of the Government's response, Defendants further argue that Double

Jeopardy bars a second [3] prosecution because Defendants did not "consent" to the granting of the mistrial.

The record of the proceedings that occurred outside the presence of the jury on the morning of February 2, 1995, indicates that following the Government's explanation to the Court of the circumstances that prompted the tardy disclosure of the additional Jencks materials, Mr. Hunterton, counsel for Defendant Lou Etta McKoy, immediately stated "Your Honor, I'd like to move to strike the testimony of Ms. Lengacher, the testimony of Mr. Troy. I'd also like to move to dismiss." Transcript of Jury Trial (Day 6, Volume VI)(hereinafter Day 6 Transcript), at VI-7. After Mr. Hunterton expressed his understandable dismay at the late position, the Court addressed the issue of what sanctions should ensue. The following colloquy occurred:

> THE COURT: The question is what sanction should be imposed under the circumstances, [what are] the range of options that the Court has. Number one, certainly continuance of the trial to allow the defense adequate time to review the materials, to reexamine either of the witnesses or any of the witnesses regarding the content of them is one option. The others are of the type you mentioned including potentially, mistrial, though you've not moved for that.
>
> [4] MR. HUNTERTON: I'm sorry. That's what I meant when I said to dismiss, your Honor. I meant mistrial. I apologize.

Day 6 Transcript, at VI-9 (emphasis added).

Turning to Mr. Toscher, counsel for Defendant Roy

Frank McKoy, the Court inquired as to his position, to which Mr. Toscher replied "Your Honor, I've discussed it with Mr. Hunterton, and I join with him." Day 6 Transcript, at VI-10.

Thus, from the record, it is evident that while Mr. Hunterton initially requested only dismissal of the entire action, he later clarified that he was seeking a mistrial; a position in which Mr. Toscher joined. Later, when the Court ruled that a mistrial was warranted under the circumstances, the Court explicitly noted, "The defense has appropriately moved for mistrial. I clearly understand why. In fairness to their clients they find it necessary to do that, and that's why I grant the motion." Id. at VI-56 (emphasis added). This ruling was not objected to by the defense. The Court further concluded, however, dismissal of the entire case was not warranted, Neither because of the unintentional Jencks violations nor on double jeopardy grounds. Id. at VI-55 and VI-56.

The Double Jeopardy Clause of the Fifth Amendment protects a person from being "twice put in jeopardy of life or limb" for the same offense. The Double Jeopardy clause, however, does not bar a second prosecution where the defendant has chosen to terminate the first proceeding. As explained by the Supreme [5] Court, a "defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant." United States v. Scott, 437 U.S. 82, 98-99 (1978); United States v. Dahlstrum, 655 F.2d 971, 975 (9th Cir. 1981), cert. denied, 455 U.S. 928 (1982). The critical determination is whether there was "a significant level of

participation by the defendant in bringing about the termination of his trial," Dahlstrum, 655 F.2d at 975. Emphasis is placed on the importance of the defendant "retaining primary control over the course to be followed." Id. (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)).

Defendants contend that it was the Court's refusal to strike the tainted testimony which, at least in part, gave them no choice but to seek a mistrial. The Court finds this contention lacks merit because Defendants had already moved for a mistrial before this Court made any rulings on whether to strike the testimony of Santillo Troy and Joan Lengacher or dismiss the action. Indeed, Defendants sought a mistrial immediately after learning of the Jencks violation and before this Court made any rulings as to what remedies were appropriate. In short, Defendants chose to seek a mistrial as a remedy for the Jencks violation. Under these circumstances, at the time the mistrial was requested, the Court finds that Defendants retained "primary [6] control over the course to be followed" and "voluntarily chose" to avoid submitting the case to the trier of fact.

Furthermore, where, as here, a defendant requests a mistrial, the Double Jeopardy Clause does not bar a retrial "unless the defendant can show that the 'conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial." United States v. Lun, 944 F.2d 642, 644 (9th Cir. 1991)(quoting Oregon v. Kennedy, 456 U.S. 667, 679 (1982)). See also United States v. Nelson, 718 F.2d 315, 320 (9th Cir. 1983) ("Express consent to mistrial, including a defense mistrial motion, usually removes any double jeopardy bar to reprosecution."). This proposition remains true even in situations where it is assumed that

"defendants had no realistic choice but to seek mistrial." Lun, 944 F.2d at 646.

Relying primarily upon Dahlstrum, supra,[1] Defendants argue that their "consent" to the mistrial cannot be construed in the face of the Government's violation of the Jencks Act coupled with this Court's refusal to strike the tainted testimony. Defendants, however, have confused the granting of a mistrial absent their "consent", or over their objection, with the fact that they affirmatively "moved" for a mistrial. This is not a case where the Government moved for mistrial or the Court sua sponte declared one.

Where the defendant moves for a mistrial, even where it is demonstrated that he had no realistic choice but to seek one, the defendant must further demonstrate that the prosecutor "intended" such results. Lun, 944 F.2d at 646. In the case at bar, even assuming no realistic choice existed but to seek a mistrial due to the Jencks violation coupled with this Court's rulings, because Defendants moved for a mistrial, they must further demonstrate that the prosecutor intended to goad them into this action. Defendants however, do not advance such an argument and the record does not support it.

In determining whether the Government attempted to induce a defendant into seeking a mistrial, the courts have focused upon three objective factors: 1) whether the Government objected to the motion; 2) whether the Government's case was going badly at the time the motion was

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[1]Dahlstrum was decided before the Supreme Court's ruling in Oregon v. Kennedy, 456 U.S. 667, 679 (1982), and the Ninth Circuit's ruling in United States v. Lun, 944 F.2d 642, 644 (9th Cir. 1991).

made, causing the prosecutor to fear acquittal and affirmatively seek a mistrial; and 3) whether the Government would gain an advantage from a new trial. See Lun, 944 F.2d at 644-46.

In the case a bar, contrary to Defendants assertion that the mistrial was granted "at the urging of the Government," although the Government did not directly object to the granting of a mistrial, the record is clear that Government counsel attempted to dissuade the Court from granting a mistrial by maintaining that a continuance with recross-examination would cure the Jencks violation:

[8] MR. BARR: And there is, as a matter of routine, there are no statements in those audit files. In this instance there happened to be those statements as part of the investigation in this case.

With respect to inability to represent clients and damage done, your Honor, we're trying to do this in as timely a fashion as possible. It's certainly not something--it's certainly not irreparable. I mean, we can cure it. But nonetheless, at bottom . . .

THE COURT: How do you propose it be cured?

MR. BARR: Well, Santillo Troy is still on the stand.

THE COURT: Uh-huh.

MR. BARR: Joan Lengacher--it's still the Government's case in chief. We're more than prepared to have her come back for recross-examination. It's not as though we've rested or the defense has rested . . .

Day 6 Transcript, at VI-13. This remedy, however, was unacceptable to Defendants' counsel.

As to the second factor, whether the Government's case was going badly, the Court finds that although the prosecution's case obviously would turn on the jury's assessment of the credibility of Government witnesses, the case would clearly have withstood a Motion for Judgment of Acquittal under Federal Rule of Criminal [9] Procedure 29(a). While hardly a compelling prosecution, it cannot be characterized as "going badly"--at least not until the Jencks violation which resulted in the mistrial now at issue.

Third, the Court further finds that there is no substantial advantage to the Government from the new trial. As recognized in Lun, the Government may receive the "fringe benefit" of having "time to regroup and regain control, and the opportunity to soften the negative impact of damaging evidence by defusing it in opening statement." 944 F.2d at 646. These incidental benefits occur anytime a case is retried. Along with these benefits, however, come some disadvantages for the Government as well. "If the defendant consents to a mistrial, the prosecutor must go to the time, trouble, and expense of starting all over with the criminal prosecution. Kennedy, 456 U.S. at 686 (Stevens, J., concurring). Witnesses may disappear or forget their testimony after the long delay." Lun, 944 F.2d at 646. Finally, there are some advantages to the defense as well:

> They have the opportunity to see a substantial portion of the [G]overnment's case-in-chief. They will also have the opportunity to portray the surprising incidents of the first trial in the most beneficial way for their position, from the

very outset.

Id.

Under the circumstances surrounding the Government's tardy disclosure of the Jencks materials, the Court finds Defendants voluntarily chose to seek a mistrial as a remedy for the Jencks violation, and that it was not the intent of the prosecution to induce Defendants into requesting a mistrial. The inadvertent [10] tardy production of the Jencks material was unfortunate and troubling to the Court. At the same time, declaring a mistrial was to the benefit of all parties.[2] Accordingly, the Court finds that retrial of these Defendants is not prohibited by the Double Jeopardy Clause.[3]

Alternatively, Defendants seek to suppress the testimony of Joan Lengacher and Santillo Troy based upon the Government's prior Jencks act violation. The Government responds that suppressing the testimony of Lengacher and Troy would be inappropriate in the absence of bad faith by the Government and a finding that any such striking would be a windfall to Defendants.

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[2]Defendants attempt to make much out of the Court's statement that "[t]o strike the testimony of these witnesses, however, I think absent any basis to find that there was bad faith or misconduct on the part of the Prosecution, would also be unfair. It would be unfair to the Government and a windfall to the defense." Day 6 Transcript, at VI-53. The Court was clear in its ruling, however, that it was in fairness to Defendants that Defendants' counsel sought a mistrial and the reason this court granted that request. Id. at VI-56.

[3]Even though the Court has found that Defendants' Double Jeopardy claim is without merit, the Court finds that Defendants' have asserted a "colorable" claim and does not find that their motion was frivolous.

On January 31, 1995, two days prior to the Government's disclosure that it had failed to turn over the Jencks material on Lengacher and Troy, the Government called Daniel Tomaro as a witness in its case-in-chief. While Mr. Tomaro was still on the stand, but after the defense had concluded its cross-examination, an issue was raised as to whether there existed a memorandum of an interview between the witness and Internal Revenue Agent Michael Berry, and whether any such memorandum had been disclosed [11] to the defense as per their request. See Transcript of Jury Trial (Day 4, Volume IV)(hereinafter "Day 4 Transcript"), at IV-112-113. After the Court excused the jury, the following colloquy occurred:

> THE COURT: Okay, have a seat. Mr. Barr, I'm confused. You said you provided the statement; Mr. Hunterton and Mr. Toscher said they didn't receive it. When was it provided and under what circumstances?
>
> MR. BARR: Well first of all, your Honor, I was under the impression--that's a December '92 memorandum that I've just provided them.
>
> THE COURT: I understand; that's what I'm talking about.
>
> MR. BARR: And I was under the impression that it had been provided. I'm going to have to rely . . .
>
> THE COURT: Under the impression from whom?
>
> MR. BARR: Well . . .
>
> THE COURT: You produced it, didn't

you?

MR. BARR: I thought I produced it here in court four days ago to them at the end of court. I didn't keep a receipt, your Honor. It's a two or three paragraph memorandum. And if I haven't produced it, I apologize. I was under the [12] impression that I gave them all the Tomaro Jencks statements at the time.

But nonetheless . . .

Day 4 Transcript, at IV-114.

After defense counsel informed the Court that they in fact had not received the statement in question, and the prosecutor again apologized for failing to turn over the memorandum, the Court directed the following admonition to the prosecutor and case agents Michael Berry, a Special Agent with the Internal Revenue Service, and Joseph Burns, a Revenue Agent with the Internal Revenue Service:

THE COURT: Well, I want to avoid this Agent Berry and Agent Burns. I don't know who's got all the statements. Who physically has them all--Agent Berry--in his file of everybody he's interviewed.

AGENT BERRY: Yes, your Honor.

THE COURT: Okay. Are there any others? What I want to do is go through everyone of them and make sure that everything that Agent Berry has has been produced, every statement of every witness.

MR. BARR: I will do that again. I thought I did that last week.

THE COURT: Let's do it again.

MR. BARR: Okay.

THE COURT: How many are there, and how long will it take?

[13] MR. BARR: Well, I'm under the impression, as I stand here, that that would be the only exception that I'm aware of. We did not decide to call this witness until at the very end of putting our case together, and so that would account perhaps for maybe my not even getting what I've just given them, because Mr. Berry just produced that.

THE COURT: Well, you need to meet with Agent Berry and make darn sure he gives you everything that he has that relates to any witness you put on the stand, or it's going to have severe consequences, Mr. Barr.

Day 4 Transcript, at IV-115-116.

It was only two days later, on February 2, 1995, the sixth day of trial, that the Government prosecutor informed the Court the Government had failed to turn over the statements of two additional witnesses that had already testified and been cross-examined since the Court's admonition of January 31, 1995.

With the second violation of Jencks, the Defense moved to strike the testimony of witnesses Lengacher and Troy. A decision to strike a witness's testimony due to noncompliance with the Jencks Act will generally depend on (1) the culpability of the Government, and (2) the injury to the defendant. United States v. Echeverry, 759 F.2d 1451, 1456 (9th Cir. 1985); United States v. Sterling, 742 F.2d 521, 524 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985). At the time, the Court

concluded that striking [14] the testimony of Lengacher and Troy would be inappropriate given the finding that the Government's failure to provide the materials was unintentional. The Court further concluded that any injury suffered by Defendants would be remedied by granting Defendants' motion for mistrial. Defendants argue, however, that unless the statements of Lengacher and Troy are suppressed in the second trial, the result of the Court's rulings is that the Government, having caused the circumstances that led to the mistrial, will face no sanction at all. After further review of the trial transcript of the proceedings occurring on January 31 and February 2, 1995, the Court agrees, and concludes that the Government should not be allowed to escape sanction for its failure to timely provide the Jencks materials after being specifically admonished by this Court to do so two days earlier.

The decision whether to impose sanctions under the Jencks Act rests within the discretion of this Court. Echeverry, 759 F.2d at 1456. The language of the Jencks Act and Federal Rule of Criminal Procedure 26.2, however, contemplates situations where a conscious choice has been made not to comply with a production order. 2 Charles A. Wright, Federal Practice and Procedure § 439 (1982), at 607. As Professor Wright explains:

> It is different, however, if the nonproduction is the result of oversight or negligent conduct not amounting to a conscious election. Situations of this kind do not seem to have been contemplated by Rule 26.2(e) or its predecessor in the statute. In such situations, the court ought to be free to apply whatever remedy the

justice of the case may require under the circumstances.

2 id. at 607-08.

[15] Here, although the Court is confident that the Government's actions were not intentional and did not amount to a conscious election, the Court, also must conclude that the Government's failure to provide the Jencks statements of two additional witnesses after being admonished by the Court to carefully review its files and turn over any such material amounts to what can only be characterized as negligence on the part of the Government. Consequently, after further review, the Court finds that it would be unjust for the hardship that is the result of the Government's negligent actions to fall solely on Defendants' shoulders.

Therefore, the Court finds that the interests of justice in this case requires that the testimony of Joan Lengacher and Santillo Troy should be suppressed during the second trial as a sanction for the Government's failure to timely provide Jencks materials during the first trial. While the Government will undoubtedly view this sanction as harsh, it must be remembered that in a criminal trial, where an individual's liberty is at stake, the Government is under a strict obligation to proceed with the prosecution in manner that conforms with the dictates of the law. Where, as here, the Government repeatedly fails in this obligation and the result is a mistrial, it becomes necessary to reinforce the importance of this responsibility through the imposition of sanctions.

[16] **II. Defendants' Motion to Dismiss and/or Suppress (# 101)**

By this Motion Defendants renew earlier Motions to Dismiss and/or Suppress (# 26) which were denied on July 25,

1994. See Order (# 53). In those earlier Motions, Defendants sought dismissal of the Indictment against them on the grounds that the Internal Revenue Service was conducting a criminal investigation under the guise of a civil tax audit and that its alleged civil investigation of Defendants was permeated with fraud, trickery and deceit. In the alternative, Defendants sought dismissal of all statements and other evidence obtained in connection with the civil investigation.

The earlier Motion to Dismiss and Motion to Suppress were referred to the Magistrate Judge for consideration. After conducting an evidentiary hearing, the Magistrate Judge issued his Report & Recommendation (# 46) denying both Motions. The Magistrate Judge concluded that "[t]he evidence presented at the evidentiary hearing does not demonstrate that the IRS was conducting a criminal investigation under the guise of a civil tax audit." See Report & Recommendation (# 46), at 7. The Magistrate Judge further concluded that Defendants had failed to demonstrate that evidence was obtained through misrepresentation. Id. at 11. After the de novo review, the Magistrate Judge's Recommendation that the Motion to Dismiss and the Motion to Suppress should be denied was affirmed by this Court. See Order (# 53).

The instant Motions are based upon the testimony of Daniel Tomaro at the first trial in this matter. Defendants argue [17] Mr. Tomaro's testimony indicates that Special Agent Mike Berry had been involved in the civil audit of Defendants as early as July 1991, a time that is prior to the IRS's formal referral of this case to the Criminal Investigation Division in September 1991. As a result, Defendants seek to dismiss the indictment, or, in the alternative, suppress all information which was gathered by the IRS during the course of its civil

investigation.

During cross-examination, Mr. Tomaro provided testimony regarding a letter dated July 7, 1991, that contained Mr. Tomaro's signature, but the body of which Mr. Tomaro testified was not in his handwriting. After initially having difficulty recalling who prepared the letter, Mr. Tomaro testified that the letter was prepared by Special Agent Mike Berry during an interview and was given to him to sign. See Day 4 Transcript, at IV-78-79. Specifically, Mr. Tomaro testified as follows:

> THE COURT: Which agent? Do you remember the name of the agent?
>
> THE WITNESS: I'm trying to remember. It was--I believe it was Mike, was it not?
>
> THE COURT: Mike Berry, Agent Berry?
>
> THE WITNESS: It was Mike . . .
>
> MR. TOSCHER: Mike, do you want to stand up so . . .
>
> THE COURT: Okay, great. All right.
>
> BY MR. TOSCHER:
>
> Q You're saying it was Agent Berry who wrote this out?
>
> [18] A Right.
>
> Q That's your recollection?
>
> A I believe so.
>
> Q And you read it after it was all written out before you signed it?
>
> A Right.
>
> Q Excuse me?

A Yes.

Later, Mr. Tomaro was again asked whether the letter was written by Agent Berry during the interview, to which he responded, "Right." Day 4 Transcript, at IV-80.

During redirect by the Government prosecutor, the subject of the letter was again addressed. After again examining the letter in question, the prosecutor asked Mr. Tomaro if he "specifically remember[ed] whether or not Mr. Berry wrote that letter?" Id. at IV-101. Mr. Tomaro responded as follows: "I remember when I met with Mr. Berry that we had talked for along time and he took a lot of notes, but I really honestly don't remember an actual letter." Id. During the Court's inquiry as to the meeting with Agent Berry and the letter, Mr. Tomaro further testified that he was unable to remember the letter. Id. at IV-102. Finally, Mr. Tomaro testified as follows with regard to the letter:

BY MR. BARR:

Q Okay. Mr. Tomaro, you do not know who wrote that letter. Is that correct?

[19] A No, I don't.

Id. at IV-102-103.

Defendants renewed Motion to Dismiss and/or Suppress rests entirely upon their contention that Mr. Tomaro testified quite clearly that it was Agent Berry who wrote the letter in question. It is Defendants' contention, therefore, that because the letter is dated July 7, 1991, the IRS was improperly conducting a criminal investigation under the guise of a civil tax audit. The Court finds, however, that Mr. Tomaro's testimony does not indicate much more than Mr. Tomaro could not specifically recall who had written the letter. Although Mr. Tomaro initially stated that Agent Berry had written the letter,

he later testified that he could not specifically recall exactly who prepared it. The best that can be said is that Mr. Tomaro testified inconsistently regarding the letter. Under these circumstances, the record does not support a finding that the IRS was conducting a criminal investigation under the guise of a civil tax audit.

Nevertheless, the Court notes that granting Defendants' Motion for mistrial in this matter may have precluded further development of the record regarding whether Agent Berry prepared the letter. For that reason, Defendants' Motion will be denied without prejudice, and may be renewed during the second trial if, after the record has been sufficiently developed, a renewed Motion is warranted.

[20] IT IS THEREFORE ORDERED THAT Defendants' Motion to Dismiss on Double Jeopardy Grounds (#106) is Denied.

IT IS FURTHER ORDERED THAT Defendants' Motion to Suppress the Testimony of Joan Lengacher and Santillo Troy (# 106) is Granted.

IT IS FURTHER ORDERED THAT Defendants' Motion to Dismiss and/or Suppress (#101) is Denied without prejudice.

DATED: April 18, 1995

PHILIP M. PRO
United States District Judge